Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1870

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,
Petitioners,

v.

RICHARD J. COLLINS, JR., et al.,
Respondents.

No. 75-1872

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

RICHARD J. COLLINS, JR., et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF RESPONDENT
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OPINIONS BELOW

The opinions below are given correctly in the briefs of the Securities and Exchange Commission (Commission) and E. I. du Pont de Nemours and Company (Du Pont) and Christiana Securities Company (Christiana) heretofore filed with this Court.

JURISDICTION

The jurisdiction of this Court is set forth in the briefs of the Commission and Du Pont and Christiana.

STATUTES INVOLVED

The Statutes involved are set forth in the briefs of the Commission and Du Pont and Christiana.

Question Presented:

Whether the Commission in approving a merger of a controlling investment company into its controlled operating company should value the investment company on the basis of the market value of its assets *as well as* the market value of its own outstanding stock.

STATEMENT OF THE CASE

By way of reference, Respondent will refer to the joint Appendix of the parties as "A" and the Appendix to the Commissions' petition for a writ of certiorari in No. 75-1872 as "Pet. App."

Christiana was organized in 1915 for the sole purpose of controlling Du Pont and has retained such control during all the time thereafter. (A. 39, A. 45). It was organized to serve the interests of its own stockholders. (A. 42).

Both Christiana and Du Pont consistently deny that Christiana controls Du Pont. (A. 43, A. 480, A. 481, A. 566, A. 708).

Over a two year period preceding the merger talks Christiana had sold in the market at a discount of 20% to 25% of its net asset value and had paid income taxes of 7.2%. (A. 25, A. 31).

Mr. Irénée du Pont, Jr., President of Christiana, started the merger talks by a letter to the Chairman of Du Pont in which he wrote that Christiana might be willing to give up the benefits which it had by reason of holding a large block of Du Pont stock. (A. 638).

The President of Du Pont, Mr. C. B. McCoy, gave his 40 shares of Christiana to his grandchildren so as to avoid a ripple in the negotiations. (A. 571).

The Board of Directors of Du Pont, as a group, after allowing for Mr. McCoy's gift of his 40 shares of Christiana, owned 417,624 shares of Du Pont and 606,867 shares of Christiana. (A. 800).

Du Pont appointed two of its officers, Messrs. Charles B. McCoy and Irving S. Shapiro, to represent it in the negotiations. Mr. McCoy had spent his entire business career with Du Pont and was making $272,600 per year. (A. 569, A. 800). Mr. Shapiro had worked for Du Pont since 1951 and was making $193,913 per year. (A. 499, A. 800). Du Pont did not appoint one of its outside directors to negotiate with Christiana. (A. 485).

In the negotiations, the Christiana people pushed for their own interests, and on the other side of the table, Mr. McCoy was representing both Christiana and Du Pont. (A. 599, A. 600).

Each side hired investment bankers to advise on the terms of the deal. The Du Pont negotiators told their adviser, First Boston Corporation, that the *principal advantage* to Du Pont would be freedom from the Investment Company Act's requirements which had delayed and impeded business discussions in the past. (A. 697). First Boston Corporation agreed with this idea.

At this time, Du Pont knew that it had taken one and one half to two employees on a full time basis to comply with the Act's requirements. (A. 853). Mr. McCoy hoped that these regulatory requirements had not cost Du Pont any money or

profits. (A. 598, A. 599). They had not been of earthshaking importance according to Mr. McCoy.

One of the investment advisers, Morgan Stanley and Co., originally thought that Christiana could liquidate itself without the cooperation of Du Pont at a cost of 2.84% of its assets; this should be the highest discount it would accept, and therefore a discount between 0.5% to 2.0% would be fair to both sides. (A. 881, A. 882).

But then it was discovered that as a practical matter Christiana could not liquidate itself without serious unknown tax costs which could run vastly higher than 2.84% of its assets. (A. 445, A. 446, A. 630, A. 631, A. 879). Possibly $300 to $400 millions in taxes.

After Christiana and Du Pont had completed their negotiations, they filed an application for approval by the Commission. The Commission then prepared a six page notice describing the transaction. (A. 24 through A. 33).

The Du Pont Company on October 4, 1972 mailed a copy of this SEC notice to all its 225,000 common stockholders, together with a covering letter from Mr. McCoy. (Note 34 on A. 52; A. 974).

As received by the stockholders, Mr. McCoy's letter was a one page document in front of the attached six page notice from the Commission.

Mr. McCoy's letter said that the stockholders need do nothing at the present time. (A. 974, A. 975).

The SEC notice at its end said that if anyone wanted a hearing on the matter he had to act by October 27, 1972 (A. 32).

The Manufacturers Hanover Trust Company holding Du Pont stock in 361 accounts where it had limited or no voting authority, received the notice and did not send it to its co-fiduciaries be-

cause it believed it did not require any shareholder action. (A. 977).

From its 225,000 stockholders there were 15 replies to the SEC; Du Pont and Christiana opposed a hearing on the matter. (Collins Appendix A-1 to his brief in opposition to certiorari).

At the hearing before the Commission, the applicants produced witnesses who testified that Christiana did not control Du Pont. Among them were:

Mr. Charles Townsend of Morgan Stanley (A. 287, A. 298, A. 299).

Mr. Irving S. Shapiro (A. 480, A. 481).

Mr. Charles B. McCoy (A. 574, A. 597).

At the hearing, both Du Pont negotiators testified they believed the big advantage to Du Pont was something different than what they had told their advisor, First Boston Corporation, during the negotiations. They testified that the big advantage was not the freeing of Du Pont from legal requirements that had hindered it in the past, but rather, it was the freeing it from the possibility of coming under the control of bad or irresponsible persons in the future. (A. 472, A. 473, A. 573).

In the proxy material which is to be sent to the Du Pont stockholders there is no reference to what Messrs. McCoy and Shapiro testified to be the big advantage to Du Pont. The proxy lists other purported advantages. (A. 717).

Mr. Shapiro testified that *as a practical matter* the income taxes being paid by Christiana were not a pressure on Christiana. (A. 489).

The Commission found "Christiana remains in overwhelming measure a du Pont family affair," (A. 44) and there was "the striking disparity between the substantial benefits to be received by Christiana and the far more modest ones inuring to Du Pont." (A. 72).

SUMMARY OF ARGUMENT

The Act is not an insurance policy saying that once a group has taken control of a corporation they have a *right by law* to bail themselves out of their problems at little or no cost by means of a merger with the controlled corporation.

Despite all the testimony and briefs by both sides in this case, the whole matter really boils down to this idea.

Persons who create holding companies to further their own interests must be prepared to face the consequences of their own acts. If they want the benefits, they must be prepared for losses. This is the essence of this case.

Petitioners' view is that they put a given number of shares of Du Pont into Christiana, and now the public stockholders of Du Pont should help them recover essentially the same number of shares.

Respondent's view is that persons who create and enjoy the benefits of a controlling holding company should be prepared for a day of reckoning—that the subservient stockholders should be allowed to bargain as a stranger with the holding company should the opportunity arise.

The Petitioners attempt to phrase the questions before this Court and twist the opinion of the Court of Appeals into making the issue a choice of the market value of Christiana's own stock *or* the market value of its assets. That is to say, they frame the issue as one of either/or, whereas the question is one whether weight should be given to both values.

The Court of Appeals correctly held:

"As we see it, Christiana would have us ignore the market value of its stock in determining reasonableness and fairness.

We cannot do so. Market value, like net asset value, is a factor which must be considered in determining the worth of an investment. The fact that the market value of Christiana stock is affected by the intercorporate dividend tax and unrealized capital gains liabilities is no reason to ignore that value in determining its worth." (Pet. App. 86a)

Respondent believes we should have clear pictures of the true natures of both the merger and Christiana.

In substance, this is a transaction between the dominant and subservient stockholders of the same corporation.

In form, the merger is a transaction between the dominant stockholder and the corporation it controls—but in economic reality the Du Pont Company is not a primary party in interest, rather it is the public stockholders of Du Pont who are the other primary party in interest. The business of the Du Pont Company will not be changed. (A. 66).

Now as to a clear picture of Christiana, the law and common sense say it is in control of Du Pont. (15 U.S.C. 80a-2(a)(9).) Christiana owns 28% of Du Pont, and the remaining 72% is held by some 225,000 stockholders.

If control means anything, it is the election by Christiana of its own candidates as directors and principal officers of Du Pont. It would be impossible to control the company without controlling its directors and principal officers.

By itself, the fact that Christiana controls DuPont does not condemn the merger. But where control by Christiana is used to obtain far more favorable terms than it otherwise could obtain then it is an unfair bargain. International Radio Telegraph Co. v. Atlantic Communication Company, 290 F. 698. This case is in direct conflict with the opinion of the Commission. (A. 62).

Petitioners Du Pont and Christiana deny this control. They admit that Christiana has substantial benefits from its ownership of Du Pont stock. (A. 638).

But if we try to pin them down as to exactly what the benefits are, we hear only that it is potential control.

The Commission has an inconsistent view of Christiana. It sees Christiana as a functionless investment company (A. 39), in control of Du Pont. (A. 45; and page 5 of the Commission's brief). A control device over one of the world's largest industrial complexes is not a functionless investment company. (A. 41).

Christiana must be seen for what it was before and during the negotiations on the merger.

This court held in the two *Chenery* cases that the decision of the Commission must be judged on the grounds upon which the record discloses that the decision was made. If the grounds are not correct, the decision should not be sustained. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80. But if the grounds are rational, the decision must be upheld. *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194.

Respondent maintains the Commission's grounds were irrational and contrary to law. They were as follows:

(1) The terms inflict no detriment on the non-Christiana Stockholders; (A. 61).

(2) Christiana stock and Du Pont stock are economic equivalents; (A. 49).

(3) Net asset value rather than market value of Christiana sets a fair exchange ratio. (A. 38).

(4) The standard of fairness of a transaction between affiliated parties is different than one between non-affiliated parties. (A. 62).

Finally, the Court of Appeals' opinion, contrary to petitioners' claims, had its principal focus on the administrative record and not on Professor Upson's report.

IN SUBSTANCE THE TRANSACTION IS BETWEEN THE DOMINANT STOCKHOLDER AND THE SUBSERVIENT STOCKHOLDERS OF THE SAME CORPORATION.

While in form we have a merger of two corporations, in substance it is a deal between the controlling stockholder on one side and the subservient ones on the other side. The business of the Du Pont company itself will not change. (A. 66). It is only a question of who will own how much of the same pie.

Here we see one group of stockholders against another group of stockholders. Regardless of the form of the transaction, *the Du Pont Corporation itself is not a primary party in interest to the deal.*

The primary parties are Christiana and the public stockholders of Du Pont. The Du Pont company is a party in form only. "In no way will the Christiana merger detract from either the assets or the earning power of that business." (A. 66).

The Christiana people alone chose their representatives, and they were people who by reason of their stock ownership in Christiana had a great deal at stake. (A. 555). No one would suggest that the public stockholders of Du Pont had any say in the selection of the Christiana representatives, nor indeed any right to such.

But then we look to other representatives on the other side of the table. They were men who had risen to high office carrying high salaries during all of which time Christiana had been in control of Du Pont. Christiana controls Du Pont by control of its directors and principal officers. There is no other way it can control Du Pont. Christiana controlled the representatives of the public stockholders.

One of them held 40 shares of Christiana, and to use his own words, in order not to cause a ripple, he gave them to his grandchildren. (A. 571). But neither of these men gave up his salary. They maintain that they had no affiliation with Christiana. (Footnote 18(c), page 27 of Du Pont-Christiana brief).

There is an economic affiliation between the principal officers of a corporation and its controlling stockholder. This can be denied only by looking at form and not at substance. This does not make the principal officers bad men, or good men for that matter. It is simply a recognition of human nature and nothing more.

Mr. McCoy testified that he felt an obligation to look out for the interests of both sides. (A. 600). This is the very practice of serving two masters condemned in *Pepper v. Litton*, 308 U.S. 367 (1939).

The repeated denials by the officials of Du Pont and the investment bankers that Christiana controls Du Pont might be passed off as jokes if the question were not so central to this case.

The fact is that they do not want to talk about the matter of control. Their responses to this question are evasive and hedging. (A. 287, A. 480, A. 481, A. 597).

THE PROPOSED MERGER INFLICTS DETRIMENTS ON THE NON-CHRISTIANA HOLDERS.

An element in the value of any corporate stock is its vote. Other things being equal, voting stock is more valuable than non-voting stock. Voting power is an element of value.

Without a controlling holding company on top of Du Pont, the value of all Du Pont common shares would be the same. If a holding company is in control of an operating company, the

meaning of this control is that the votes of the publicly held stock of the operating company have lost some of their power if, in fact, they have not been made meaningless.

By taking the control away from the public stockholders, Christiana has inflicted a detriment on them.

The Act in saying that the ownership of 25% of the voting stock represents control of a corporation recognizes reality and brushes aside the argument that the public stockholders of Du Pont have their legal right to vote. (15 U.S.C. 80a-2(a)(9).

The Commission says that people have every right to form a controlling holding company. (A. 59). Respondent says that if this is the case, the public stockholders have every right to a defense against an action which can only detract from the value of their stock.

Ruthless people will see if a holding company can be dissolved at little or no cost that they will have everything to gain and little or nothing to lose by creating one.

Respondent states that the proposed merger terms take away a real defense that the public stockholders may have in the future against the formation of a new controlling holding company. This is a detriment.

The 7.2% income tax alone is not a sufficient defense. Mr. Shapiro said in a *practical sense* the tax does not bother Christiana at all. (A. 489).

The fact Christiana has boxed its stockholders into very serious tax problems is certainly a principal cause for Christiana's stock selling at a discount. (A. 50-A. 51). Other things being equal, control stock is worth more than stock which is not in control.

Informed investors are aware of this discount which is certainly a disadvantage to Christiana. And this most apparent

fact very well may have deterred power hungry people from forming other controlling holding companies.

But if the holding company always has the option of the tax free escape route at little or no cost by a merger with its controlled operating company, it will be freed of its most serious tax disadvantage. As a consequence, the discount should be lessened greatly, and there should be considerably less restraint on the creation of holding companies.

But if the public stockholders are allowed to bargain as a stranger with the holding company on its dissolution, people will think twice before organizing a company whose only object is to impair the voting power of the public stockholders.

For this reason the public stockholders of Du Pont should not be satisfied merely with the end of their domination by Christiana—*they should be given the use of a fundamental law of fairness which says that if you set out with the idea of gain, you must be prepared to take a loss.* Otherwise, the public stockholders are sitting ducks for anyone hunting control.

It is inconceivable to believe that Congress in writing the Act at one moment said that the ownership of 25% or more of the voting stock puts one in control of a corporation, and at the next moment wrote an insurance policy protecting those in control against overreaching by the very persons they control. (15 U.S.C. 80a-2(a)(9) and (17(b).)

Congress never intended that the Act should be so construed so as to allow people freely to create and dissolve holding companies according to their own interests and to the detriment of the public stockholders.

Truly, this the heart of the dispute before this court.

The Court may take judicial note of the well-known practice of the Commission to insist that full disclosure to stock-

holders of pertinent facts be given in proxy material. All parties should agree that this is a true and desirable practice.

But what is the purpose of all such effort by the Commission? The answer only can be that the stockholders should be able to vote intelligently for persons best qualified to be directors and on issues requiring stockholders approval.

But why bother to vote if the election is controlled by another party?

The Commission is embarking on a course that can only encourage the diminishment, if not the destruction, of the meaning of the public stockholders' votes. If the Petitioners say that Christiana's sole purpose is something else than the impairment of the voting power of the public stockholders, let them do so.

Respondent is not talking about the legal right of the public stockholders to vote; he is talking about the power, the real meaning of their votes. This cannot be shrugged off as idle speculation without a foundation. The Act itself, in recognizing the possibility of control and defining what constitutes control distinguishes between the legal right to vote and the meaning of the vote.

It is surprising that the Commission with its well-known diligence in working to prevent stockholders from being misled never has said a word about Mr. McCoy's letter accompanying the Commission's notice of the merger.

It never has commented on the fact that Manufacturers Hanover Trust Company, in line with Mr. McCoy's letter, did not notify its co-trustees of the Commission's notice. (A. 974 through A. 977). If the bank was misled, how many plain ordinary stockholders were misled?

His letter without a doubt contained a misleading statement in telling the stockholders that they need do nothing at the

present time. The truth is that if they did not like the deal they had to notify the Commission not later than October 27, 1972. (A. 32).

Furthermore, there is an obvious detriment in forcing the Du Pont company to pay a higher price for all of the assets of Christiana than it would pay for all of the issued common stock of Christiana.

This is shown on page 22 of the Commission's brief where it says that "the net market value of its assets is the minimum selling price because it would normally be economically irrational for the owners to sell for less." But this is only one side of the transaction.

It would be equally irrational for the buyer to pay more for the assets than he would for all of the stock of the corporation which owns the assets.

The idea of a minimum price that Du Pont must pay because it is an affiliate is a particular detriment because there is no corresponding duty on Christiana to sell to Du Pont. Christiana was entirely free to sell to a third party at a higher price, without any obligation to share the proceeds of such sale with Du Pont.

THE TRANSACTION IS NOT AN EXCHANGE OF ECONOMIC EQUIVALENTS.

The Commission holds that the merger is essentially an exchange of economic equivalents. (A. 49).

No one, not even the United States Government in the form of the Securities and Exchange Commission, can say that two stocks are economically equivalent without referring to some standard of measure.

Without a standard, we are judging without reason. The Commission has given no such standard.

The standard of measure in the economic field is money.

If apples sell for eighty cents per dozen, and oranges sell for One Dollar per dozen, they are not economically equivalent despite the fact that both may contain the same amount of vitamins and taste as good as each other. Only when they sell at the same price are they economically equivalent.

Christiana and Du Pont stocks have inherently different characteristics which are reflected in their long standing different market prices.

First, because of the income taxes on holding companies, a given amount of Christiana shares having a net asset value equal to 100 shares of Du Pont common cannot pay the same dividend as 100 shares of Du Pont. The Christiana dividend has to be reduced by the 7.2% income tax paid by Christiana, whereas, the dividend on 100 shares of Du Pont is not reduced by a holding company tax. Stocks paying different dividends are not economically equivalent.

Second, the voting power of a given amount of Christiana shares having a net asset value equal to 100 shares of Du Pont common has a far greater power than the voting power of 100 shares Du Pont common. This is the fundamental principle of the holding company concept.

Control of the holding company can be had with fewer votes and this, in turn, gives control of Du Pont. Therefore, a given number of shares of Christiana with a net asset value of 100 shares of Du Pont represents an entirely different voting power than what is contained in 100 shares of Du Pont common. Stocks with different voting powers are not economically equivalent.

The fact that over a continuous period of years the market value of Christiana has been at a 20 to 25% discount from its net asset value is a recognition of these two elements, plus recog-

nition of the tremendous taxes to be paid if Christiana liquidated itself. (A. 51).

On the day before the merger negotiations were announced, Christiana was selling at $147.00 per share and Du Pont at $168.25 per share. (A. 199, A. 200). As Christiana's net asset value was essentially 1.15 shares of Du Pont common, it had a net asset value of 1.15 times $168.25, or $193.49 per share.

If, in fact, the two stocks were economic equivalents, the Treasurer of Du Pont would have been justified in paying up to $193.49 in the over-the-counter market for one share of Christiana, and offsetting the transaction by selling 1.15 shares of Du Pont common out of its treasury on the Stock Exchange.

Later, when the outside auditors would ask him what he had been doing on April 28, 1972, he would reply that he had been simply obliging one of the Christiana people at no cost to the company, for after all, it received 1.15 shares of its own stock in exchange for 1.15 shares. This reasoning very well could be taken right from the Mad Hatter's Tea Party because he would not have been measuring the two stocks by the correct yardstick, namely dollars and cents.

Only if we are going to change economic reality by changing the tax laws, by changing Christiana from a closed end investment company to an open end investment company in which a stockholder is free to exchange his stock for a pro rate share of its assets—only then can we say that Christiana stock and DuPont stock are economic equivalents.

Christiana stock would be the economic equivalent of its net asset value only if it could freely be exchanged for 1.15 shares of Du Pont without charge.

The Christiana holders are free to liquidate their corporation subject to tremendous income taxes.

Is anyone going to say that income subject to taxation is the economic equivalent of income free of taxation? The same amount of income from tax free bonds is economically different than the same amount from taxable bonds.

Property which is subject to taxation, as would be the case if Christiana were to liquidate itself, is not economically equivalent to property which is free of taxation as would be the case in this merger.

NET ASSET VALUE *AND* MARKET VALUE OF CHRISTIANA SET A FAIR EXCHANGE RATIO.

Now Christiana insists that it be paid almost net asset value by its controlled corporation.

Only when Christiana has its controlled corporation as a possible buyer, do we hear Christiana talking about its net asset value. Consider how the present stockholders of Christiana acquired their stock. It could have been by:

1. Inheritance.
2. Gift.
3. Purchase on the over-the-counter market.

If he acquired it through inheritance or gift, taxes were not paid on net asset value. *Mary A. B. Du Pont, et al. Executors v. Commissioner of Internal Revenue,* 38 Bd. Tax Appeals 926 (1938). *Paulina Du Pont Dean v. Commissioner,* 19 TCM 281 (1960). These cases recognize the economic reality of the value of Christiana stock. The stockholders in these cases were realistic about net asset value.

Nobody, including the Commission, would claim that the transactions made in the over-the-counter market were unfair because they were at a discount from net asset value. Of course,

if we believe "Arm's length bargaining is at best a crude and inexact method of determining fairness" (Du Pont Christiana brief pages 27-28) the open market transactions were unfair.

But now when those in control are dealing with their controlled corporation as a possible purchaser, suddenly net asset value is said to be the only fair price.

Certainly this is a double standard.

Respondent can sell his Du Pont stock on the New York Stock Exchange and with the cash buy Christiana at a discount in the over-the-counter market.

In economic reality he is trading his Du Pont stock for Christiana stock according to a ratio set by market prices.

In principle it is the same as though he had made a direct exchange with a Christiana holder, giving him Du Pont stock for Christiana stock.

Petitioners cannot refute this statement.

But now when the Du Pont corporation is going to deal with the Christiana stockholders we have an entirely different ratio of exchange.

Somehow, the Commission holds that the controlled party Du Pont must exchange at a more favorable ratio than the controlling stockholder can find in the open market.

Page 17 of the Commission's brief talks about the danger of profits to insiders. The public stockholders of Du Pont in this merger cannot be turned into insiders and Christiana into an outsider.

On page 24 of the Commission's brief the Christiana stockholder are described as "disadvantaged investors." In view of the ownership of Christiana, with 95% of its stock held by some 338 people, it is difficult to see the world of Christiana as a

group of disadvantaged investors. (A. 44). How can control for over 50 years of "one of the world's greatest industrial complexes" (A. 41) be said to have produced a group of disadvantaged investors?

If the law gives the stockholders of a controlling holding company the right to a merger with its controlled corporation on essentially a net asset basis, we have a one way street in favor of the holding company at the expense of the public stockholders. For the holding company it is clearly "Heads I win," and for the public stockholders, "Tails you lose." This is overreaching the public stockholders.

TEST OF FAIRNESS OF THE TERMS IS WHETHER THEY WOULD HAVE APPEALED TO TWO NON-AFFILIATED PARTIES.

The Commission says that *the law* prohibits Du Pont from bargaining for better terms. (A. 62; page 29 of its brief).

Du Pont and Christiana are more explicit in their brief saying that arm's length bargaining is at best a crude test of fairness; that neither of them could act in the spirit of a pawn broker. (Pages 27, 28, Du Pont-Christiana brief).

If "arm's length bargaining is at best a crude and inexact method of determining fairness," why did they conduct the negotiations so that they would have the earmarks of an arms length bargain? (Note 18, page 26, of Du Pont-Christiana brief; A. 91).

In a free economy, as opposed to a state controlled one, every day business transactions are conducted by arm's length bargaining. Du Pont's and Christiana's judgment on arm's length bargaining is just plain wrong.

Why should Du Pont and Christiana condemn "the law of the commercial and financial jungle?" (Page 28, Du Pont brief).

Under what law did they organize Christiana for the sole purpose of dominating the public stockholders of Du Pont and do so for fifty years?

If they were not free to bargain in the spirit of a pawnbroker, why did they hire three investment bankers to give advice? The business predecessors (not necessarily the family forebears) of the investment bankers were goldsmiths and pawn brokers.

Today, a loan of $25.00 is made by a pawn broker; a loan of $2,500.00 by a banker; a loan of $25,000,000.00 by an investment banker. The business of all three of them is the same —lending money. It is only a question of how much money.

The Commission claims that a striking disparity of benefits, (A. 72) in a deal between the strong and the weak, is not overreaching where the strong gets the lion's share. Respondent says that a striking disparity of benefits in favor of the stronger party is overreaching.

If that is not overreaching, what is overreaching?

The disparity in benefits between the party in control and the subservient is at least eight to one. (Du Pont Christiana brief pages 6 and 7) Christiana gets $450 million and Du Pont gets $55 million). This is a gross imbalance.

If we look at the merger results on one share of Christiana and one share of Du Pont, the benefits are fantastically greater than eight to one in favor of Christiana. The table (at A. 202) shows that Christiana per share receives considerable increases in everything that really matters; namely, earnings per share, dividends and market value. Du Pont receives only an increase in earnings of 4 cents per share on an annual basis, from $7.33 to $7.37 which is less than 1%.

Therefore, to be conservative, and using only the eight to one advantage, would any one say that two strangers, ***neither***

of whom was legally obligated to make a deal, would strike such a bargain?

The Commission admits that strangers would not have done so but comes up with a rule of law, without precedent or reason, that because they are affiliated the deal is fair. (A. 62) And they are affiliated only because Christiana was formed for the sole purpose of controlling Du Pont.

The gross imbalance of 8 to 1 in favor of the controlling party is supposedly justified by saying, "some transactions are more important to one side than to the other. This is one of that type." (A 59)

Why is this transaction more important to one side than to the other? As the sole purpose of the merger is to make money for stockholders, it is arbitrary for the Commission to say that the merger is more important to one side than the other. Money is as important to the public stockholders as it is to Christiana.

This is a most arbitrary stand by the Commission.

It is contrary to common sense justice—something akin to Louis XIV's statement, "I am the State." No one could question him.

It is openly contrary to the standard of fairness set for affiliated companies in *International Radio Telegraph Co. v. Atlantic Communication Company*, 290 F. 698.

That case held that the test of fairness of a contract between two affiliated companies is whether it would appeal to two non-affiliated companies.

That case held:

> "A fair way to determine the question (of validity of traffic contract) is to consider whether the proposition sub-

> mitted would have commended itself to an independent corporation. If to such a corporation the proposition would not have seemed unfair or unconscionable, a court should not be inclined to condemn the agreement merely because one party to it controlled the other." *International Radio Telegraph Co. v. Atlantic Communication Company*, 290 F. 698, 702.

The Act did not set aside this standard, and the Commission has no right to do so.

There is no way on earth that we can reconcile the standard used in International Radio Telegraph, supra, with the Commission's view that because Du Pont and Christiana are related a different test of fairness should apply.

The merger terms are not condemned simply because Christiana was in control—the terms are condemned because the Commission admits they would not have been accepted by an independent corporation. (A. 62).

Christiana used its control of Du Pont and Du Pont's principal officers to obtain better terms for itself than could be obtained otherwise.

The Act demands fairness. It is impossible to reconcile the finding "the striking disparity between the substantial benefits to be received by Christiana and the far more modest ones inuring to Du Pont" (A. 72) with a fair deal for both sides.

THE FOCAL POINT OF THE COURT OF APPEALS DECISION WAS THE ADMINISTRATIVE RECORD AND NOT PROFESSOR UPSON'S REPORT.

The Petitioners argue that the procedure of the Court in appointing Professor Upson as a contract consultant and putting various questions to him violated proper judicial review in this matter.

The foundations of the Court of Appeals' opinion should be the law as well as the evidence produced in the administrative record of the Commission.

The Commission itself stated that the questions presented by this merger application are essentially legal ones.

The Court in appointing Professor Upson specifically directed that he was not to advise the Court on the fairness of the merger terms.

The Professor's report did not become the principal focus of the opinion of the Court of Appeals.

Respondent states that a thorough reading of the opinion of the Court of Appeals shows that its principle focus was on the evidence produced in the administrative record.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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